uses the ILEC loops to connect with retail customers. All of Integra's investments in infrastructure have been made with this design in mind. This design is critical to Integra's business plan because its customer base is broadly dispersed throughout each geographic market, with an average of 94% of the businesses being potential Integra customers. To compete with ILEC

transport, ATP transport must provide Integra the same benefits. It must connect ILEC central offices where Integra is collocated with Integra's hub in a ring configuration. Affidavit of Dave Bennett, Appendix E. As discussed earlier, the FCC recognized the importance of this issue in its discussion of Transport in the TRO. See section III. F. 2. of this brief, p.21-22.

The ILEC network design and the ATP network design are two entirely different models, designed for entirely different purposes. The ATP network design was never intended to connect with ILEC central offices so ILEC loops could be used to connect with retail customers. ATPs took an entirely different approach to network design.

ATPs made a deliberate decision to by-pass ILEC central offices and not use ILEC loops to connect with customers. Instead, ATPs built networks directly to the customer-very large customers or locations where it could reasonably be anticipated that large numbers of customers might someday exist, like office buildings and airports. Facilities were run from the ATPs hub directly to large customer premises. A few ILEC central offices might be connected but these connections were all made very strategically, depending entirely upon connecting with a retail customer.

For example, Integra is collocated in 12 Qwest central offices in the Seattle, Redmond, and Tacoma area. An ATP that must remain anonymous because of Non-disclosure Agreements has more overlap with the ILEC transport network in this market than any other ATP in any other market. However, the ATP only has transport connecting 5 of the 12 central offices in which Integra is collocated. Again, this ATP has the broadest footprint of connections to ILEC central offices of all the ATP's surveyed and still only has connections to less than half the central offices in which Integra is collocated. Appendix E, Affidavit of Dave Bennett.

For Integra to utilize the 5 routes indicated above, the cost for additional fiber would be $53,000 more per month, more than a 500% increase. Integra's fiber Optic equipment would not work in this configuration due to the additional 115 miles in length of the fiber route without installation of repeaters. In addition, Integra would still have to utilize ILEC fiber to connect the remaining collocations. Integra has attempted to negotiate a commercial agreement with one of the two ILEC's in our service territory to determine what the cost for dark fiber would be if the unbundling requirement were to be removed but the ILEC has refused to negotiate on any item other than UNE-P. In addition to the technical challenges and costs associated with significantly increasing the transport mileage, the additional mileage increases the potential for service interruptions and outages. See Affidavit of Dave Bennett, Appendix E.

This transport product is not competitive with ILEC transport because it does not connect ALL the central offices in which Integra is collocated. It cannot replicate the ring configurations that are essential to Integra's network design. Without these rings, Integra has no means to connect all 12 ILEC central offices where Integra serves customers today. Appendix E, Affidavit of Dave Bennett.

Exhibit B to Appendix E, Affidavit of Dave Bennett, illustrates the differences between Integra's ring configuration using ILEC dark fiber and the offering of an anonymous alternate transport provider. Exhibit B has two pages: the first page shows Integra's existing network design and depicts four different ring configurations connecting various Qwest central offices using Qwest dark fiber. This is the design of Integra's network as it exists today. This is the design and configuration that an alternate transport provider must replicate in order to have a competitive product.

The second page of Exhibit B shows the routes the anonymous alternate transport provider has available in the Seattle, Redmond, and Tacoma area. As you can see, the alternate provider routes do not even come close to duplicating any of Integra's four ring configurations. The four ring configurations have a total of approximately 25 routes. Of those 25 routes, the alternate provider has transport on only 7 of them. Connecting with central offices was simply not an important feature of the ATP network design. The operational, maintenance, and cost barriers to having multiple providers of transport on a given ring are described in the following sections.

Integra designed its network to use the ILEC distribution system to connect with retail customers. ATPs designed their networks to BY-PASS ILEC central offices, and connect a large customer directly to the ATPs hub. These two different systems have completely different parts and pieces, and one part or piece is not the same as the other. These two systems cannot compete for loops and transport because the loop and transport products they have are entirely different products. The ILEC network has loops to each and every building in the area. The ATP networks do not.

As an example, another anonymous ATP in the greater Seattle area has less than 200 buildings connected to its network. Integra's target customer base includes 94% of the businesses in this market area. How many buildings house small to medium sized businesses in the Seattle, Tacoma, Renton, Bellevue, Kirkland, Redmond, Bothell, and Everett areas? 15,000? 20,000? More? How can a company with loops to only a minute fraction of the buildings in an area be considered competitive with an ILEC that has loops to

EVERY building? To be competitive, an alternative product must provide the same customer access as the ILEC product. This is especially true when Integra's target business customer is spread through-out a given market, not lumped into one location or a few readily identifiable buildings.

Integra is completely motivated to use ATP transport if indeed it is a more efficient, more economical product than the ILEC's. Integra has some long-haul routes where ATP product is used. Affidavit of Dave Bennett, Appendix E. For long haul routes, connecting one city to another, for example, ATP product is generally the same product as ILEC long-haul transport and can be considered competitive. In the short-haul, connecting ILEC central offices in the same community, ATP products are not competitive.

The design of the ATP short-haul product means that longer amounts of facilities are used, and given that the ATP pricing scheme is distance sensitive, the longer the facility, the more expensive the product. The ATP design has created an expensive product that caused the insolvency of the companies that created it; an expensive product that cannot compete with short-haul ILEC transport. Affidavit of Dave Bennett, Appendix E.

ii. **Analysis of Additional Economic and Operational Barriers resulting from ATP product design differences that preclude Integra from using existing alternate provider transport.**

First, none of the ATP's have transport that allows Integra to access all of its target market. As explained above, 94% of all business addresses are within Integra's target market. Exhibit D to Appendix C, Affidavit of John Nee. This is a very broad, very large, very ubiquitous market that requires a broad, large, ubiquitous transport system. ATP product connects to less than 1 % of Integra's target market.

Second, none of the ATPs claiming to have wholesale transport for lease are connected to all of the ILEC central offices with which Integra is presently connected and must continue to be connected. See Bennett Affidavit, Appendix E. This means that, operationally, ATP transport is an entirely inadequate substitute for ILEC transport, resulting in the "daisy chaining" that the FCC has already properly said must be avoided. See TRO, par. 401.

Third, for those central offices where ATPs have connections, any ATP lit fiber would be significantly more expensive than the ILEC dark fiber Integra currently uses. Lit fiber is more expensive than dark fiber because of the investment the lessor has made in the optronics necessary to light the fiber. Lit ATP fiber is therefore not an adequate economic substitute for ILEC dark fiber as it results in millions of dollars of stranded optronics investment for Integra.

Fourth, for those central offices where ATPs have connections, using ATP dark fiber would cause Integra to also strand the investment it has already made in optronic equipment to light ILEC dark fiber. Integra cannot just remove the optronic equipment from the ILEC dark fiber and put it on the ATP dark fiber. Integra would have to purchase some new, duplicative equipment to light the ATP fiber. The optronic equipment on the ILEC network would

have to stay in place because the network is being used and can't simply be taken out of commission and moved enmass to light up ATP fiber. A portion of Integra's $5 million dollars invested in optronics would be stranded, and additional costs would be incurred to re-configure Integra's entire transport network.

Fifth, for those central offices where ATPs have connections, using ATP lit fiber would cause Integra to incur millions of dollars in stranded costs. Integra currently leases dark fiber from the ILECs. Integra has already invested in excess of $5 million in optronic equipment. If Integra were forced to abandon ILEC dark fiber and move to lit fiber from alternate providers, in addition to the added cost of lit fiber, Integra's investment in optronic equipment would be completely stranded. Affidavit of Dave Bennett, Appendix E.

Sixth, ATPs do not normally provision either DS-1 or DS-3 products. The primary focus of ATP provisioning is dark or lit fiber connecting long-haul locations or large customers with the ATP hub. They only incidentally provision products connecting local central offices or products used for trunking. This is not the focus of their business. As explained in section I, DS-1 and DS-3 products are critical pieces of Integra's network.

Lastly, the operational barriers based on the radically different designs of the ILEC and AT's networks are not just a matter of one engineer's pleasure over another's: these differences translate into significant economic barriers in the form of significantly higher leasing costs, stranded investment, and increased equipment cost.

iii. Additional Operational Barriers to using Transport from Alternate Providers

The TRO has an extensive record on the operational barriers to requiring a CLEC to rely on multiple providers of transport. See, e.g., paragraphs 401 and 402. The FCC focused on route-by-route triggers that "avoid the costs and operational problems associated with cobbling together multiple vendor links to complete a route between two incumbent LEC central offices." TRO par. 401. The use of alternate providers of transport on a route-by-route basis causes the very same operational barriers that the FCC acknowledged needed to be avoided.

Integra has used ILEC dark fiber to deploy a multiple ring configuration network. This means the routes begin at Integra's point of interface with Qwest and go from office A to office B to office C to office D and back to office A. Since each "route" is considered to be between offices, a different carrier could have facilities between different offices and these routes would be considered not impaired. For example, one carrier might have facilities connecting office A to office B; a second carrier connects office B to office C; a third connects C to D.

This would create the exact scenario of "daisy chaining" that the FCC refers to in par. 401 as a scenario that should be avoided because of the significant operational barriers it creates for a CLEC. Affidavit of Dave Bennett, Appendix E. To avoid these FCC acknowledged problems, Integra should not be forced to lease transport from providers that cannot connect an entire ring of the network. As has been shown, any other approach is fragmented and costly.

E. Transport Impairment Analysis: Application of the standards established in the FCC's TRO.

In its TRO, the FCC established standards for determining impairment for DS-1, DS-3, and dark fiber transport. Two different standards were established: One standard determined when it was reasonable to expect a requesting carrier to self-provision transport; the second standard determined when it was reasonable to expect that the requesting carrier had wholesale alternatives available such that there was no impairment without ILEC transport. Both standards are to be applied on a route-by-route basis. Under the USTA II analysis, to find impairment on one route in an area where multiple carriers have deployed transport on other routes within the area requires an explanation of why there is impairment on the one route but not the others.

The standard for self-provisioning is the presence of three or more competing carriers, not affiliated with each other or the incumbent LEC, each having deployed non-incumbent LEC transport facilities along a specific route. See TRO par. 400. As the theory goes, if these three have self-provisioned, then this is proof positive that all CLECs can self-provision.

The standard for wholesale alternatives is the existence of two or more alternative transport providers, not affiliated with each other or the incumbent LEC, immediately capable and willing to provide transport at a specific capacity along a given route between incumbent LEC switches or wire centers. TRO par. 400.

1. Application of the Self-provisioning standard from the TRO.

After applying the self-provisioning standard, Integra is not aware of any routes where three or more competing carriers have self-provisioned transport/dark fiber. Therefore, Integra is impaired without ILEC DS-1, DS-3 or dark fiber Transport on all of its routes in all markets. See Affidavit of Bill Littler, Appendix D

Having applied the standard, an observation is in order.

Focusing solely on counting the number of companies that have self-provisioned DS-1, DS-3, or dark fiber transport is a faulty method of determining the economic feasibility of self-provisioning. For example, in Integra's marketplace, ELI, MCI, and GST/Time-Warner all claim to have provisioned transport on different routes. Even though ELI, MCI and GST

can all claim to have provisioned transport, it is equally true that all three companies experienced financial insolvency. MCI and GST actually filed for bankruptcy. ELI was propped up by a wealthy ILEC parent company and so avoided an actual bankruptcy filing. However, its public stock was de-listed prior to the parent company taking it private. See Appendix A, Affidavit of Dudley Slater. It makes no sense to base a self-provisioning standard upon the activities and business plans of companies that went insolvent doing the self-provisioning.

The fact that all three companies became insolvent is proof positive of the economic barriers to self-provisioning transport. Instead of establishing no impairment, the fact that these three companies self-provisioned transport on the way to a bankruptcy petition or stock de-listing actually establishes the presence of economic barriers to self-provisioning more powerfully than Integra could ever hope to describe. If Integra were to self-provision transport, it, too would be bankrupt.

2. Application of the wholesale alternatives standard from the TRO.

Applying the wholesale alternatives standard to Integra's markets leads to the conclusion that Integra is impaired without ILEC transport. Based on Integra's research and analysis of the network, there are no routes where two or more alternative transport providers are "immediately capable and willing to provide transport at a specific capacity along a given route between incumbent LEC switches or wire centers." See affidavit of Bill Littler, Appendix D.

Once again, having applied the standard to Integra's markets, a couple of observations are in order.

The wholesale standards in the TRO have an initial appeal to them: if two or more carriers are "...immediately capable and willing to provide transport...", a CLEC cannot claim impairment without ILEC transport. It is essential to establish the presence of **multiple providers** who actually offer wholesale products for lease. Absent multiple providers actually willing to lease product, market power becomes a critical issue. If the FCC were to decide that a requesting carrier is not impaired without access to ILEC transport based solely on the presence of one other provider, the FCC is essentially transferring the same market power the ILEC had in 1996 to this other carrier. The other carrier now knows that the CLEC has no choice but to purchase transport from it. If the ILEC is charging special access rates, the other carrier knows it can charge special access rates minus one cent. This is not a competitive environment.

But the standard also fails to consider the issue of pricing, and how the pricing available from an alternate provider may create an economic barrier

to actually purchasing transport from this provider. This is a real issue: the network design used by companies claiming to have alternate transport available results in significantly higher pricing because the pricing is distance sensitive and the design results in significantly longer transport routes than the routes designed and used by the ILECs. This issue is examined in detail in Section D, above, Transport/Dark Fiber Impairment Analysis: Economic and Operational Barriers to Using Transport/Dark Fiber from Alternate providers.

It is also critical that the FCC determine the availability of alternate transport based on a binding obligation on the part of the non-ILEC provider to actually sell transport. For example, a cable provider is not required to make its network available to competitors. Therefore, the presence of a cable provider can never justify a finding of non-impairment because a CLEC forced to turn to the cable provider for transport can just be told "No."

Likewise, neither a wireless nor a satellite provider is required to make its network available to requesting carriers. Before the FCC can justify a finding of non-impairment based on the presence of any inter-modal carrier, it must first ask Congress to amend the Telecom Act of 1996 to require cable, wireless, and satellite providers to make their networks available to requesting carriers. Until that time, the presence of a cable, wireless, or satellite provider has absolutely no impact on the obligation of an ILEC to make network elements available to requesting wire-line carriers. The FCC must not choose winners and losers. Wire-line CLECs need access to the

ILECs network elements. The presence of inter-modal carriers does not change this until the Telecom Act is amended.

F. Transport Impairment Analysis: Economic and Operational Barriers to Self-provisioning by Integra.

The economics of the customer base Integra serves do not justify an investment in transport. Companies that have provisioned transport are entirely in the wholesale business, and owned by parent companies with complimentary businesses. For example, Eventis is owned by Minnesota Power, an electric utility; SHAL is owned by four rural ILECs; Onvoy is owned by sixty-some rural ILECs.

Integra is motivated by profit. Once it becomes profitable for Integra to self-provision transport, it does not need government to push it to do so. As Integra continues to add to its customer base, the time will come to self-provision transport. But that time is not yet here.

The average Integra customer generates less than $400 per month in revenue. Dark fiber transport costs an average of $60,000 per mile to build in rural areas, and up to $350,000 per mile to build in urban areas. Suppose Integra were to self-provision all of the transport it uses in the Seattle area. The Seattle area is a mix of very urban and suburban areas. As a result, consider that the average construction cost per mile of fiber based on the ILEC central offices Integra would need to connect is approximately $271,000. Integra uses approximately 192 miles of transport in Seattle. Total cost to build transport: approximately $52 million. Appendix E, Affidavit of Dave Bennett.

To justify an expenditure of $52 million for transport in Seattle, Integra would have to have the same market conditions that the ILEC had when it built the transport: a 100 percent market share and guaranteed cost recovery plus a profit. Integra has invested over $20 million in capital and four years of time in the Washington market. Based on the current cash from operations from this market, it would take Integra approximately 10 years to recover a further investment of $52 million. Integra would likely never recover the $52 million because spending it in the first place would cause a default under Integra's loan agreement . Appendix A, Affidavit of Dudley Slater.

G. Transport Impairment Analysis: Economic and Operational Barriers to using Special Access as a Substitute for ILEC Transport.

Special access is a pricing methodology, not a product. The actual facility used to provide the underlying service is the same for both ILEC special access and ILEC unbundled network elements. The only difference is how that facility is priced.

Special Access is a way of saying it will be priced on monopoly terms. Unbundled network element is a way of saying it will be priced at TELRIC.

The same conclusion with regard to special access as a loop alternative applies to transport.

Integra only purchases transport off special access pricing list when transport is not available as an unbundled network element. Transport is not available as an unbundled network element when it crosses a rate center, a LATA, or a state border. In these instances, Integra must purchase transport off special access price lists, and it does. Affidavit of Dave Bennett, Appendix E.

Special access can never be a substitute for ILEC network elements at TELRIC for this simple reason: the business plan for Integra Telecom and all companies similarly situated was based on TELRIC pricing for unbundled network elements. It was based on TELRIC pricing for unbundled network elements because that is the pricing methodology the FCC established as the law of the land. To ask today, eight years later, if a pricing methodology that increases costs by as much as 600% is an adequate substitute for what has been is nonsensical.

If Integra were forced to move all Transport costs from TELRIC to special access, the economic impact would be approximately $880,000 per month, causing a default under Integra's loan agreement and effectively destroying the company. Today, Integra pays ILECs approximately $140,000 per month for UNE transport. At special access prices, transport costs jump to $880,000 per month, a 600% increase. See Affidavits of Dave Bennett, Appendix E, and Dudley Slater, Appendix A.

B. Verizon's claim that companies are buying special access instead of unbundled network elements is very misleading. (NOTE: Intentional duplication of Section III I as the same argument applies to transport.)

Verizon claims that the evidence shows that carriers are purchasing from special access and therefore do not need access to unbundled network elements. This is a very misleading, incomplete statement as to Integra.

During the period 1996, the beginning of competition, until January 2002, Verizon's computer systems were unable to bill for unbundled network elements. When Integra purchased unbundled network elements from Verizon, Verizon sent a bill for special access, then discounted the bill by 80% for UNEs to approximate UNE rates. See bills marked as Exhibit C, Appendix E, Affidavit of Dave Bennett.

To say or imply that companies like Integra were purchasing from special access is misleading at best. Other companies undoubtedly have their own stories. Integra was purchasing unbundled network elements and it took Verizon six years to configure its billing systems so it could bill for UNEs. Integra did not purchase special access; it purchased unbundled network elements from a company that took six years to fix its computer systems.

Verizon's bills are powerful evidence of the devastating economic impact moving to special access rates would have on Integra. Consider that Verizon had to discount special access rates by 80% to approximate UNE rates. This means that a product costing $100 on the special access price list cost only $20 on the UNE cost list. The difference between $100 and $20 is 500%, meaning that special access rates are 500% higher than UNE rates. A 500% increase in the cost of network elements is not a viable economic alternative.

C. DS-1, DS-3, and Dark Fiber Transport are all critical to Integra's success.

Integra is impaired without access to DS1, DS-3 and dark fiber transport.

Integra's business plan and product pricing was built around access to DS-1, DS-3 and dark fiber transport. Today, dark fiber is the primary method of connecting central offices in which Integra is collocated with Qwest and Verizon. Some DS-1s and DS-3s are used when dark fiber is not available, and Integra has made extensive use of DS-3s. DS-1s are used extensively as trunking to connect tandems and end offices or to extend facilities to serve customers in an ILEC central office where Integra is not physically collocated. See affidavit of Dave Bennett, Appendix E.

The differences in pricing between DS-1s, DS-3s, and dark fiber are what have the potential to devastate Integra. Before analyzing the pricing differences, it is important to understand how the different products relate to each other.

Table 8 –Transport products: same product, different volumes

Type of product	Equals this many DS-0s	Equals this many DS-1s	Equals this many DS-3s	Copper or Fiber?
DS-0	1	-	-	Copper
DS-1	24	1	-	Copper
DS-3	672 (24x28)	28	1	Copper
OC-48 (Lit dark fiber)	32,256	1,344	48	Fiber

A DS-0 is the smallest capacity product. This is a single copper pair, or its equivalent, the type typically used to serve a small business. A DS-1 is next on the hierarchy, consisting of 24 DS-0s. DS-3 is next, consisting of 28 DS-1s, or 672 DS-0s (24x28). These are all the very same products; just different volumes or quantities of the same product.

Dark fiber is unlit fiber. When dark fiber is lit, it is referenced with the letters "OC". Depending upon the type of optronic equipment used to light it, dark fiber can be lit at a capacity along a spectrum from OC-3 to OC-12 to OC-48, or even OC-192. The alphabetical reference of OC indicates optical; the numeric reference of 3 or 12 or 48 or 192 indicates the number of DS-3s. So, for example, OC-48 has the same capacity as 48 DS-3s, or 1,344 DS-1s (48x28).

Table 9 -Pricing for different volumes of Transport products

Type of product	Qwest monthly UNE price in Oregon	Cost of purchasing the same volume as DS-1s	Difference in cost between higher volume product and DS-1	Percentage increase in cost for purchasing CLEC
DS-1	$42	-	-	-
DS-3	$333	$1,176 (28 x $42)	$843 per month	253%
OC-48	$544 ($68 x 8)	$56,448 (1,344 x $42)	$55,904 per month	9,872%

Why does Integra use one product rather than another? This is where capacity and pricing come together. A certain amount of capacity is needed on a given route. Remember, Integra's potential customer base is very broadly dispersed. The average DS-1 in Oregon from Qwest costs about $42.[3] The average DS-3 costs about $333 (assumes $253 plus a mileage charge for an 8 mile route, which adds about $80). This means that it is the most cost effective for Integra to use up to 7 DS-1s on a route, rather than purchase a DS-3 (7 DS-1s times $42 equals $294). Once the capacity need increases to where 8 DS-1s are needed, it makes economic sense for Integra to purchase a DS-3 (8 DS-1s times $42 equals $336 vs. $333 for a DS-3).

Now, a DS-3 is equal to 28 DS-1s. So, once it makes economic sense for Integra to go to a DS-3, it now has the capacity of 28 DS-1s.

If the FCC were to take DS-3s away from Integra, leaving it only with DS-1s, the economic impact is devastating.

Continuing with the example: for $333, Integra gets a DS-3, with the capacity of 28 DS-1s. The cost of 28 DS-1s, if purchased as DS-1s rather than one DS-3, is approximately 28 x $42 or $1,176. This number is almost 400% higher than purchasing a DS-3: $333 vs. $1,176. This impact would be economically devastating to Integra.

This same type of example plays out with higher capacity products. Take a fiber product for example. Let's use a dark fiber product that Integra has lit with its own optronic equipment at an OC-48 capacity. The cost of an 8 mile piece of Qwest dark fiber in Oregon is approximately $544 per month ($68 per mile x 8 miles). Remember that an OC-48 is 48 DS-3s, or 1,344 DS-1s (48 x 28).

If the FCC were to take away dark fiber and leave only DS-1 transport, instead of paying $544 for an OC-48, Integra would pay $42 x 1,344 DS-1s for a total of $56,448. To be clear: without dark fiber, what costs Integra $544 per month today would cost $56,448 per month, a difference of $55,904 per month. This rate impact is significantly more devastating than even special access rates! No business plan can absorb this impact and CLEC wire-line competition will end.

[3] None of the numbers in the examples include non-recurring charges. Actual costs are therefore higher than those depicted but the exclusion facilitates a fair comparison.

The underlying product is identical, whether DS-1 or DS-3. What the ILECs really seek to remove is the volume discount that is entirely economically appropriate and contemplated in the 96 Act that requires the ILEC to open its network, providing for fair competition by making these monopoly scale economics available to new competitors. There is no greater wholesale market for DS-3 or dark fiber connecting central offices than for DS-1. Therefore, there is no policy basis for allowing ILECs to refuse to make DS-3 and dark fiber products available.

This is why it is critical that DS-1, DS-3 and dark fiber transport continue to be made available. There are no competitive alternatives to ILEC transport and the economic impact of eliminating DS-3 or dark fiber would end wire-line CLEC competition. See Affidavit of Dave Bennett, Appendix E for these examples.

J. Summary of Transport Impairment Analysis and Request for an FCC Finding of Impairment.

Integra Telecom requests an FCC finding that Integra is impaired within the meaning of section 251(d)(2)(B) of the 1996 Telecom Act without access to ILEC transport and dark fiber in the geographic markets described in Appendix B, when serving customers with 96 or fewer access lines at one location. Only three of the 20 CLECs identified as competing with Integra have self-provisioned transport. All three of those companies have experienced bankruptcy or near bankruptcy, and the product they installed is not the same product as ILEC transport, the product around which

Integra built its business plan. Only Qwest and Verizon have transport facilities reaching the potential Integra customer base. Forcing Integra to purchase alternate

provider transport would cause Integra to strand millions of dollars invested in equipment, would give those providers complete market power, and would cause the "daisy chaining" that the FCC has already said must be avoided. Special access is a monopoly-pricing scheme, not an alternative product and certainly not an alternative to unbundled network elements. DS-3 and dark fiber transport are critical to competitors wishing to serve customers with fewer than 96 access lines. Eliminating any of these products eliminates wire-line competition for this class of customers. Integra is motivated to self-provision when it is profitable to do so. Today, however, Integra is impaired without ILEC transport.

V. <u>Pricing Standards for Network Elements Obtained Under Section 271 of theTelecom Act of 1996</u>.

A. Bell Operating Companies ("BOCs") have an Independent Obligation to Provide Access to Loops and Transport under Section 271.

It is now well established that BOCs have an independent obligation to make loops, transport, switching, and call-related databases available as unbundled network elements. See 1996 Telecom Act, sections 271(c)(2)(B)(iv)-(vi),(x); USTA II, p.52; TRO, paragraphs 653-655. Unlike under section 251, a showing of impairment is not required of purchasers of section 271 elements. Assuming the BOC has not relinquished its inter-exchange carrier authority, it is obligated to provide these unbundled network elements upon request. The real question is, of course, at what price.

B. The Pricing of Section 271 Elements Must Take into Account the Congressional Intent to Open the Telecom Markets to Competition.

The FCC has decided that sections 201 and 202 of the Communications Act of 1934 govern the pricing of section 271 unbundled network elements. See, e.g., TRO, paragraph 662. The FCC goes on to say that the "just and reasonable" standard may be satisfied if, for example, a BOC is treating two CLECs the same. See TRO, paragraph 664. Unfortunately, this analysis completely fails to consider that the context in which telecom products are priced is completely different today than the context in which sections 201 and 202 of the Communications Act of 1934 were drafted and interpreted. This failure has lead to a reversible error of law.

The Communications Act of 1934 was never intended to be used to price wholesale network elements in a competitive environment. It was largely intended and used to price inter-exchange service, first in a monopoly environment, then in an oligopoly environment, and then not at all with the de-tariffing of inter-exchange services. If the FCC is going to use this same tool to price 271 network elements, it cannot use the tool as it has historically been used. Times have changed; the context is entirely different; the task to be accomplished is entirely different.

Because the Communications Act of 1934 was never intended to be used to price wholesale network elements in a competitive environment, pricing under the 1934 Act cannot be done in a vacuum. It must take into account the 1996 Telecom Act and the advent of competition, and the wholesale, competitive relationship that exists between BOCs and CLECs. "Just and reasonable" must take into account that a BOC is setting prices for a competitor, setting prices for the same network elements that the BOC uses at a specific cost in its own business; setting costs for network elements that were largely paid for by captive ratepayers in a monopoly environment.

In other words, even if the pricing standard of 201 and 202 are the applicable standards for pricing 271 network elements, the competitive relationship between the price setter and the price payor must be accounted for. And, in the 271 setting in particular, BOC pricing commitments made in order to induce state commissions and the FCC to approve entry into the long distance market cannot be forgotten or given away.

i. The Same Prices That Were in Place When the BOC Received 271 Approval Should be Charged for Network Elements Today.

BOCs were given the inter-exchange carrier authority carrot by virtue of compliance with section 271 of the Telecom Act. That compliance included compliance with certain pricing methodologies. Prices for unbundled network elements had to be reasonable and current (i.e. recently examined by state commissions). More importantly, the methodology for doing the pricing had to be TELRIC.

Compliance with TELRIC pricing was a condition of BOC entry into long distance. TELRIC was a mandated pricing methodology, absolutely required as a condition of BOC long distance entry, an FCC policy decision upheld by the United States Supreme Court, and relied upon by State Commissions and the FCC in determining that BOC markets were open to competitors. Any BOC that would have used a pricing methodology other than TELRIC would have been denied entry. This is indisputable, and one need only look at the FCC's analysis of some BOC 271 approval requests to confirm it.

"Just and reasonable" means the FCC does not allow BOCs to obtain the benefits of being in the long distance market but avoid the commitments that allowed the FCC to conclude that markets were open to competition. This would be an absurd result, and the law does not sanction absurd results.

The rates that were in place when a BOC received 271 approval are the rates that should be used to price 271 elements. These are the rates upon which BOC entry into the long distance market was based. Unless BOCs are going to give up the long distance market, they should be required to maintain the wholesale pricing that got them there.

Using the actual prices for network elements in effect at the time of 271 approval has a very solid policy basis: Consider the first section of these comments having to do with impairment. CLECs like Integra Telecom are required to make this filing with the FCC, shouldering the burden of proving impairment without ILEC unbundled network elements. Presumably, CLECs are saddled with this burden of proof because the BOCs have convinced the Courts that there are so many loop and transport providers in the marketplace that CLECs are no longer impaired without access to BOC loops and transport.

With all this presumed competition for loops and transport today, prices from the time of a given BOC's 271 approval that occurred two, three, or four years ago should be much higher than today's prices. Using unbundled network element prices from the time of a BOC's 271 approval should therefore make a BOC happy. Multiple suppliers of network elements competing with each other for sales results in decreasing prices. If, as the BOCs contend, there are so many providers of network elements out there today, prices from a 271 approval that occurred two or three years ago should be higher than the prices BOCs received today for these "competitive" elements. Also, if, as the BOCs contend, there are so many providers of network elements out there, prices for network elements should not increase 600% to special access rates under 201 and 202.

ii. At the Very Least, the Same Pricing Methodology That was in Place When the BOC Received 271 Approval Should be Used to Price Network Elements Today: TELRIC.

Even if the actual pricing numbers are not used, the pricing methodology that led to BOC long distance approval should be used. That methodology was TELRIC. If the TELRIC commitment is eliminated, a BOC's inter-exchange authority should also be eliminated. The conditions of entry go hand-in-hand with the benefit of entry. The FCC should not allow the BOCs to have the benefit of long distance entry without the commitment to competition enabled by TELRIC. This is bad policy and bad law.

C. The FCC Should Create a Class Under Section 201(b) of the Communications Act of 1934 Entitled "The CLEC" Class.

Setting 271 aside and focusing on sections 201 and 202:

Section 201 (b) requires charges, practices, and regulations to be "just and

reasonable." However, different charges may be made for different classes of communications, e.g., day, night, commercial, press, or Government. The FCC may define such classes as are "just and reasonable."

Integra Telecom requests that the FCC define a class of communications called "Competitive Local Exchange Carriers" ("CLECs"). Creating this class is just and reasonable because it is important for the FCC to acknowledge the new status of BOCs and their customers under 201 and 202. Creating the CLEC class acknowledges the unique, wholesale, competitive status of a group of customers not previously governed by wholesale pricing standards under this section.

D. BOC Charges and Practices for the CLEC Class Cannot be Unjust, Unreasonable, or Discriminatory Pursuant to Section 202 of the Communications Act of 1934.

Section 202 provides "...it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, regulations, facilities, classifications or services…". The FCC has failed to properly consider this provision. [4]

Paragraph 664 of the TRO fails to understand that the world has changed and section 202 must be considered in this competitive environment. The discrimination language of 202 must be applied to the relationship between the BOC and a CLEC, not just between purchasing CLECs. The prohibition against discrimination means that the BOC cannot discriminate against the CLEC in pricing 271 elements. These elements are the same elements the BOC uses in its business. To meet the requirements of 202, the BOC cannot treat its competitive, wholesale customer any differently than it treats itself.

The Anti-Discrimination provision requires that the costs the BOCs use for loops and transport be included in the discrimination analysis. In other words, BOCs cannot charge CLECs any more for network elements than BOCs charge themselves. Or, to say it another way, whatever BOCs charge CLECs for network elements BOCs must also charge themselves.

BOCs have internal cost numbers that they use to set prices, determine margins, etc. These numbers are readily discoverable and become an easy basis for doing 271 pricing. This is the only way to apply the anti-discrimination provision of 202 in an environment where the company doing the pricing is also competing with the companies doing the buying.

Consider it this way: BOC costs cannot be as high as special access rates. There are no products or services where BOC retail revenue is covering special access rates. So, special access rates are greater than BOC costs, which means special access rates are discriminatory.

"Special Access" is an historical concept with no role in today's competitive telecom marketplace. Today in the Telecom world, buyers of network elements must purchase them from sellers who are also using the same elements to compete with the buyers. There are two ways to purchase those elements: as unbundled network elements at TELRIC rates with a showing of impairment under section 251; or, as section 271 network elements purchased at "just and reasonable" rates that must not be discriminatory.

Whether pricing is done at TELRIC or at just, reasonable, and non-discriminatory rates, there is no room in the equation for "special access" rates. Under just, reasonable, and non-discriminatory rates, a seller must not charge its buyer/competitor any more for a product than it charges itself. Competitors should not even be discussing the existence of "special access" rates. There is no such thing for

[4] As the USTA II decision points out, the FCC's decision that 271 elements need not be combined by the BOC has not been scrutinized under the nondiscrimination requirement of section 202. The FCC seems to be applying sections 201 and 202 in the manner of days gone by, days of BOC monopoly status. The nondiscrimination requirement is critical in this new era where those doing the pricing are also competing with those doing the buying.

competitors. Rates are either TELRIC as impaired UNEs or the same cost as the BOC charges itself as 271 elements under sections 201 and 202 of the Communications Act. If a non-competitor like a large, private customer wishes to purchase network elements, a BOC may be able to charge "special access" rates. This, of course, is not a Telecom Act issue. But, today, as between competitors under the Telecom Act, there is no room for "special access" rates. This historical vestige should be eliminated from Telecom Act vocabulary.

E. Consistent With Pricing Schemes in the 1996 Telecom Act, the FCC Should Establish the Methodology and the States Should Implement It.

Instead of making 271 pricing decisions on a case-by-case basis, the FCC should establish the methodology to be utilized and then ask state Commissions to determine the actual pricing. The methodology should be any one of the following three choices: The actual prices for network elements when the BOC received 271 approval; TELRIC, the methodology in place when the BOC's received the benefit of long distance approval; or BOC's must charge themselves for network elements what they charge CLECs. State commissions should then implement the FCC chosen pricing methodology through State proceedings.

This is consistent with the handling of pricing issues under the 1996 Act, and acknowledges the expertise and local knowledge of state commissions. There is no legal or policy basis for moving away from this well-established process.

Date: September 30, 2004

Integra Telecom

By ______________________
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Appendix A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	**WC Docket**
Unbundled Access to	)	**No. 04-313**
Network Elements	)	
	)	
Review of the	)	
Section 251 Unbundling Obligations	)	**CC Docket**
For Incumbent Local Exchange	)	**No. 01-338**
Carriers	)	

Affidavit of Dudley Slater

1. My name is Dudley Slater. I am the Chief Executive Office and co-founder of Integra Telecom, a competitive local exchange carrier headquartered in Portland, Oregon.

2. I co-founded the company in 1996 as a direct response to the 1996 Telecom Act.

3. I believed from the very beginning that true competition required a competitive carrier like Integra Telecom to own and operate its own equipment. Based on that belief, Integra Telecom has invested approximately $300 hundred million dollars in switches, other infrastructure, and start-up costs. Though Integra has some UNE-P lines (less than 5%), the company has not relied on UNE-P for its market success.

4. Integra does business in five states (Oregon, Washington, Utah, Minnesota, and North Dakota), employing more than 600 people.

5. Integra Telecom has grown markedly as the marketplace embraces Integra's products and services. The company has grown from 3,800 access lines in 1996 to 73,000 in 2000 to over 200,000 today. The company receives no federal or state universal service support.

6. Integra's target market is small to medium sized business customers. The average Integra retail business customer has eight access lines at one location, generating less than $400 per month in revenue.

7. Since Integra's entry into the Telecom marketplace, retail prices offered by Integra for small to medium sized business customers have fallen on average approximately 5% per year.

8. Integra has its own data network and has plans to deploy a VOIP offering to residential and small to medium sized business customers. This facilities-based deployment will not be possible without access to ILEC loops and transport.

9. ELI's public stock was or expected to be de-listed prior to the parent company taking ELI private. It was trading at substantially depressed values resulting in the actual or anticipated de-listing.

10. Integra has invested over $20 million in capital and 4 years of time in the Washington market. Based on the current cash generated from operations from this market, it would take Integra approximately 10 years to recover a further investment of $52 million. Spending an additional $52 million in this market would cause a default under Integra's loan agreement and impair the ability of its shareholders to ever realize a return on their investment.

11. If Integra were forced to move all Transport costs from TELRIC to special access, the economic impact would be approximately $880,000 per month, causing, in isolation, a prospective default under Integra's loan agreement and effectively destroying the company.

12. If Integra were required to replace its $5 million investment in optronics and strand the existing investment, the replacement of these optronics, if funded at one time, would, in isolation, cause a default under Integra's current credit agreement with its lenders.

Dated:

Dudley Slater
Chief Executive Officer
Integra Telecom

Appendix B

Integra Telecom Service areas, by ranking in the 100 largest Metropolitan Statistical Areas

Oregon
Portland-28
Eugene-not in top 100
Salem-not in top 100
McMinnville-not in top 100

Washington
Seattle-19
Tacoma-76
Everett-not in top 100

Utah
Salt Lake City/Ogden-46
Provo-not in top 100
Park City-not in top 100

North Dakota
Fargo-not in top 100
Grand Forks-not in top 100

Minnesota
Minneapolis-St. Paul-13
Duluth-not in top 100
St. Cloud-not in top 100
Brainerd-not in top 100
Baxter-not in top 100
Nisswa-not in top 100
Little Falls-not in top 100
Moorhead-not in top 100

Out of a total of 20 service areas, only five are in the top 100 MSAs. The average ranking for the five in the top 100 is 36.

Census 2000 PHC-T-2. Ranking Tables for States: 1990 and 2000

Table 1. States Ranked by Population: 2000

Note: 1990 populations shown in this table were originally published in 1990 Census reports and do not include subsequent revisions due to boundary or other changes.

Source: U.S. Census Bureau
Internet Release date: April 2, 2001

For information on confidentiality protection, sampling error, nonsampling error, and definitions, see ***http://factfinder.census.gov/home/en/datanotes/expplu.html***.

		Census Population		Change, 1990 to 2000	
Rank	Area	April 1, 2000	April 1, 1990	Numeric	Percent
1	California	33,871,648	29,760,021	4,111,627	13.8
2	Texas	20,851,820	16,986,510	3,865,310	22.8
3	New York	18,976,457	17,990,455	986,002	5.5
4	Florida	15,982,378	12,937,926	3,044,452	23.5
5	Illinois	12,419,293	11,430,602	988,691	8.6
6	Pennsylvania	12,281,054	11,881,643	399,411	3.4
7	Ohio	11,353,140	10,847,115	506,025	4.7
8	Michigan	9,938,444	9,295,297	643,147	6.9
9	New Jersey	8,414,350	7,730,188	684,162	8.9
10	Georgia	8,186,453	6,478,216	1,708,237	26.4
11	North Carolina	8,049,313	6,628,637	1,420,676	21.4
12	Virginia	7,078,515	6,187,358	891,157	14.4
13	Massachusetts	6,349,097	6,016,425	332,672	5.5
14	Indiana	6,080,485	5,544,159	536,326	9.7
15	Washington	5,894,121	4,866,692	1,027,429	21.1
16	Tennessee	5,689,283	4,877,185	812,098	16.7
17	Missouri	5,595,211	5,117,073	478,138	9.3
18	Wisconsin	5,363,675	4,891,769	471,906	9.6
19	Maryland	5,296,486	4,781,468	515,018	10.8
20	Arizona	5,130,632	3,665,228	1,465,404	40.0
21	Minnesota	4,919,479	4,375,099	544,380	12.4
22	Louisiana	4,468,976	4,219,973	249,003	5.9
23	Alabama	4,447,100	4,040,587	406,513	10.1
24	Colorado	4,301,261	3,294,394	1,006,867	30.6
25	Kentucky	4,041,769	3,685,296	356,473	9.7
26	South Carolina	4,012,012	3,486,703	525,309	15.1
27	Oklahoma	3,450,654	3,145,585	305,069	9.7
28	Oregon	3,421,399	2,842,321	579,078	20.4
29	Connecticut	3,405,565	3,287,116	118,449	3.6
30	Iowa	2,926,324	2,776,755	149,569	5.4
31	Mississippi	2,844,658	2,573,216	271,442	10.5
32	Kansas	2,688,418	2,477,574	210,844	8.5
33	Arkansas	2,673,400	2,350,725	322,675	13.7
34	Utah	2,233,169	1,722,850	510,319	29.6
35	Nevada	1,998,257	1,201,833	796,424	66.3
36	New Mexico	1,819,046	1,515,069	303,977	20.1
37	West Virginia	1,808,344	1,793,477	14,867	0.8

38	Nebraska	1,711,263	1,578,385	132,878	8.4
39	Idaho	1,293,953	1,006,749	287,204	28.5
40	Maine	1,274,923	1,227,928	46,995	3.8
41	New Hampshire	1,235,786	1,109,252	126,534	11.4
42	Hawaii	1,211,537	1,108,229	103,308	9.3
43	Rhode Island	1,048,319	1,003,464	44,855	4.5
44	Montana	902,195	799,065	103,130	12.9
45	Delaware	783,600	666,168	117,432	17.6
46	South Dakota	754,844	696,004	58,840	8.5
47	North Dakota	642,200	638,800	3,400	0.5
48	Alaska	626,932	550,043	76,889	14.0
49	Vermont	608,827	562,758	46,069	8.2
(NA)	District of Columbia	572,059	606,900	-34,841	-5.7
50	Wyoming	493,782	453,588	40,194	8.9
(NA)	United States	281,421,906	248,709,873	32,712,033	13.2

Source: U.S. Census Bureau, Census 2000 Redistricting Data (P.L. 94-171) Summary File and 1990 Census.

Appendix C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	**WC Docket**
Unbundled Access to	)	**No. 04-313**
Network Elements	)	
	)	
Review of the	)	
Section 251 Unbundling Obligations	)	**CC Docket**
For Incumbent Local Exchange	)	**No. 01-338**
Carriers	)	

Affidavit of John Nee

1. My name is John Nee. I am the Vice President of Marketing for Integra Telecom.

2. In my capacity as the Vice President of Marketing, I contracted with Riley Research Associates to conduct a statistically valid survey of businesses in Integra's target market. The purpose of the survey was to identify businesses that are within Integra's target market, with 96 or fewer access lines at one location, and ask them to identify their local exchange carrier. The survey was conducted in the five largest MSA's in which Integra does business: Portland/Vancouver, Seattle/Bellevue/Everett, Tacoma, Salt Lake City/Ogden, and Minneapolis/St. Paul. All business surveyed were located in rate centers in which Integra competes. The businesses were pulled at random by Riley, with a goal of having 400 complete surveys in each MSA . A total of 1,944 businesses responded to the survey. The methodology and results are attached as Exhibit A.

3. The following companies were identified by businesses as being a current local telephone service provider: Qwest, Integra, Verizon, AT&T, Eschelon, McLeod, Allegiance, Popp, ATG, Comcast, MCI, XO Communications, Sprint, US Link, Century Tel, ELI, and Tel West.

4. None of the carriers identified in the independent survey is a satellite or wireless provider. Only one cable company appears in the survey but it has a statistical insignificant market share, 1%, or 20 of 1,944 customers, 10 of whom were in the State of Washington. I reviewed Comcast's tariffs for the state of Washington (tariffs are not required to be filed by CLECs in the state of Oregon) and Comcast does not appear to have a tariffed business offering. Qwest, Verizon, and Century Tel are all ILECs. Every other local service provider is a wire-line CLEC or ILEC.

5. Also attached to my Affidavit is Exhibit B, a survey of customers who left Integra Telecom, conducted under my supervision and control. Each customer was selected randomly and asked to identify the carrier it went to upon leaving Integra Telecom. The carriers identified are Qwest, Eschelon, US Link, McLeod, Verizon, Integra, Popp, XO, and Allegiance. None of the companies identified in the internal survey is a cable, satellite, or wireless carrier. They are all telecom wire-line CLECs or ILECs.

6. Exhibit C to my affidavit is a chart showing the percentage of Integra's business customers with a certain number of access lines at one location. As the chart shows, 99.8% of Integra's retail business customers have fewer than 96 access lines at one location.

7. Exhibit D to my affidavit is a chart showing the number of companies in each of seven key markets that fall within the small to medium sized businesses targeted by Integra. The data is produced by Dunn & Bradstreet. The chart shows the total number of companies in a given market and the number of companies that have fewer than 100 access lines at one location. Business customers with fewer than 100 access lines at one location are Integra's target market. The chart allows the reader to understand that Integra's customer base is wide-spread, ubiquitous, with customer's literally located on every point of the ILEC network. Integra customers are not concentrated in large buildings or in new developments. For example, 94% of the businesses located in the Portland, OR/Vancouver, WA market area are potential Integra customers. To serve these customers, Integra needs access to all loops and transport in a given market, not just to selected loops and transport.

Dated: 9/30/04

John Nee, Vice President of Marketing, Integra Telecom

Exhibit A

INTRODUCTION

In order to determine its current market share in the industry, compared to Qwest and other competitors, Integra Telecom asked Riley Research Associates to conduct a market study in five key Regions / MSA's.

Specifically, the project goal was to:

- Quantify current levels of market share across the industry
- Measure customer satisfaction levels across the industry to confirm previous indications that Integra is excelling in terms of service, compared to its competitors
- Measure market-wide awareness of Integra

METHODOLOGY

Riley Research Associates, with input from Integra, designed the questionnaire and sampling plan to accomplish the above goal. The stratified sampling plan was designed to ensure a high level of accuracy on a regional basis. A total of 1,944 interviews were conducted, providing an overall margin-of-error of +/-2.2% at a 95% level of confidence. The five regions / MSA's were stratified as follows (at a 95% level of confidence):

Region / MSA	Sample	Margin-of-error
Portland-Vancouver, OR-WA	389	+/-4.97%
Seattle-Bellevue-Everett, WA	390	+/-4.96%
Tacoma, WA	387	+/-4.98%
Salt Lake City-Ogden, UT	389	+/-4.97%
Minneapolis / St. Paul, MN	389	+/-4.97%
Total	1,944	+/-2.20%

The sampling process began by limiting it geographically, based on the aforementioned MSA's. We then eliminated all area codes and prefixes in which Integra did not compete, based on its rate centers. From that universe of businesses, we randomly selected approximately 5,000 businesses per MSA, which subsequently became our call list.

All interviews were conducted in a "blind" fashion, meaning that respondents did not know on whose behalf we were calling. Fielding took place between August 3rd and August 13th, 2004. Interviewers spoke with respondents between 8:00 a.m. and 4:30 p.m., PDT.

The sample taken for this poll was representative of the overall market – 75% of businesses polled have fewer than 10 employees at their location and 77% have annual sales volumes of $2.5 million or less.

A copy of the questionnaire follows the report in the Appendix, and cross tabulations are contained in a separate document. Only those differences between market subsegments found to be statistically significant are cited in the body of the report.